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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

RALPH A. HUNTZINGER, on
 Behalf of Himself and All Others
 Similarly Situated,

Plaintiff,

v.

AQUA LUNG AMERICA, INC.,
 Defendant.

Case No: '15CV1146 WQHKSC

CLASS ACTION

CLASS ACTION COMPLAINT FOR:

1. VIOLATION OF CONSUMERS
LEGAL REMEDIES ACT, CIVIL
CODE §1750 *et seq.*;
2. VIOLATION OF THE UNFAIR
COMPETITION LAW,
BUSINESS AND PROFESSIONS
CODE §17200 *et seq.*; and
3. BREACH OF IMPLIED
WARRANTY

DEMAND FOR JURY TRIAL

Case No.

CLASS ACTION COMPLAINT

1 Plaintiff Ralph A. Huntzinger brings this action on behalf of himself and
 2 all others similarly situated against defendant Aqua Lung America, Inc. ("Aqua
 3 Lung") and states:

4 **NATURE OF ACTION**

5 1. Plaintiff and other consumers purchased Suunto-branded dive
 6 computers, including the Suunto Cobra, Suunto Cobra 2, Suunto Cobra 3, Suunto
 7 Cobra 3 Black, Suunto Vyper, Suunto Vyper 2, Suunto Vyper Air, Suunto
 8 HelO2, Suunto Gekko, Suunto Vytec, Suunto Vytec DS, Suunto D9tx, Suunto
 9 D9, Suunto D6, Suunto D6i, Suunto D4i, Suunto D4, and Suunto Zoop
 10 (collectively, "Dive Computers"), that were marketed and distributed by Aqua
 11 Lung, Suunto's exclusive United States distributor. Aqua Lung distributes the
 12 Dive Computers to dive stores all over the United States for resale, and also
 13 markets the Dive Computers directly to consumers. Aqua Lung is also one of
 14 five Suunto-authorized repair facilities in the United States that repairs the Dive
 15 Computers.

16 2. The Dive Computers are devices used by scuba divers to provide
 17 information critical to the diver's safety, including information about the depth
 18 of the dive, the dive time, water temperature, safety stops, stop depths and time
 19 for required decompression, air tank pressure, and estimated remaining air time.
 20 An inaccurate display of this information can result in serious injury or death to
 21 the diver. Plaintiff and other consumers purchased the Dive Computers
 22 expecting them to function properly as a dive computer and display accurate
 23 information.

24 3. Each of the Dive Computers marketed and distributed by defendant
 25 contains materially the same software and hardware that operates the Dive
 26 Computer's critical functions. However, the software and/or hardware in the
 27 Dive Computers is defective because it can malfunction, causing the Dive
 28 Computers to provide inaccurate information about a dive.

1 4. Defendant, as an authorized repair facility for the Dive Computers,
2 is acutely aware of the defective software and/or hardware in the Dive
3 Computers. In fact, the defect is so well known to defendant that when a Dive
4 Computer comes in for repair due to malfunction, defendant's only attempt at
5 repair is to replace the battery. If the Dive Computer continues to malfunction
6 with a new battery, and it is still under warranty, the Dive Computer is replaced
7 with a new Dive Computer because the defective software/hardware cannot be
8 repaired. However, the replacement Dive Computers also contain the defective
9 software and/or hardware. This leaves consumers feeling as if they have fully
10 repaired and functioning Dive Computers, when in reality the new Dive
11 Computers suffer from the same defect and can similarly malfunction during a
12 dive.

13 5. Despite knowing about these dangers, defendant does not warn
14 consumers, or even the Consumer Product Safety Commission ("CPSC"), of the
15 defects existing in the Dive Computers. Instead, defendant continues to
16 expressly and impliedly represent that the Dive Computers are well-designed,
17 properly manufactured, and safe for their intended use.

18 6. As a result of defendant's omissions regarding the safety of the Dive
19 Computers and their defective software and/or hardware, plaintiff and the
20 proposed class have purchased a product which is dangerous and does not
21 function as advertised.

22 7. Plaintiff brings this action, on behalf of himself and other similarly
23 situated consumers who have purchased a Dive Computer to obtain redress and
24 to require defendant to properly inform consumers of the potential dangers
25 associated with using the Dive Computers. Based on violations of state unfair
26 competition laws and defendant's omissions and misrepresentations, plaintiff
27 seeks injunctive and monetary relief for consumers who purchased the Dive
28 Computers. Plaintiff has suffered injury in fact and lost money or property in the

1 form of purchasing the Dive Computer as a result of defendant's alleged unfair
2 business practices.

3 **JURISDICTION AND VENUE**

4 8. This Court has original jurisdiction pursuant to 28 U.S.C.
5 § 1332(d)(2). The matter in controversy, exclusive of interest and costs, exceeds
6 the sum or value of \$5,000,000 and is a class action in which there are in excess
7 of 100 class members and many members of the class are citizens of a state
8 different from defendant.

9 9. This Court has personal jurisdiction over defendant because it is
10 authorized to conduct business and does conduct business in California.
11 Defendant has marketed, promoted, and distributed the Dive Computers in
12 California and has sufficient minimum contacts with this State and/or has
13 sufficiently availed itself of the markets in this State through its promotion,
14 distribution, and marketing to render the exercise of jurisdiction by this Court
15 permissible. Defendant also has its headquarters in California.

16 10. Venue is proper in this Court pursuant to 28 U.S.C. §§ 1391(a) and
17 (b) because a substantial part of the events or omissions giving rise to the claim
18 occurred because plaintiff purchased the Dive Computer in this judicial district.
19 Venue is also proper under 18 U.S.C. § 1965(a) because defendant transacts
20 substantial business in this District and is headquartered in this district.

21 **PARTIES**

22 11. Plaintiff Ralph A. Huntzinger resides in San Diego, California. On
23 or about May 14, 2013, plaintiff purchased a Suunto Cobra 3 dive computer from
24 leisurepro.com for \$699.95. Plaintiff purchased and used the Suunto Cobra 3
25 dive computer believing it was safe to use during scuba dives, when in fact the
26 Suunto Cobra 3 was defective, resulting in an inaccurate display of dive related
27 information. Had plaintiff known that the Suunto Cobra 3 was unsafe and unfit
28 for its intended use, he would not have purchased or used it. Plaintiff suffered

1 injury in fact and lost money or property as a result of defendant's unfair
 2 business practice. Plaintiff does not seek to recover for personal injury damages
 3 for himself or on behalf of class members.

4 12. Defendant Aqua Lung America, Inc. is a Delaware corporation with
 5 its headquarters in Vista, California. Aqua Lung is in the business of distributing
 6 and marketing scuba diving products, including the Dive Computers. Aqua Lung
 7 marketed, and distributed the Dive Computers to thousands of consumers in the
 8 United States, including California.

9 **FACTUAL ALLEGATIONS**

10 13. Aqua Lung is the oldest dive equipment manufacturer in the United
 11 States. For over 60 years, Aqua Lung has manufactured or distributed scuba
 12 diving equipment, including masks, fins, breathing devices, regulators, and dive
 13 computers. In addition to manufacturing and distributing Aqua Lung-branded
 14 dive products, Aqua Lung also distributes and services products manufactured by
 15 other companies.

16 14. Aqua Lung is the exclusive United States distributor for Suunto-
 17 branded dive computers, including the Dive Computers at issue and is a Suunto
 18 authorized repair facility for the Dive Computers. The Dive Computers retail for
 19 between approximately \$300 and \$1,050 each.

20 15. The Dive Computers are devices used by underwater divers to
 21 measure various aspects of a dive critical to the safety of the diver. During the
 22 descent in an underwater dive, as the water pressure outside the body increases,
 23 nitrogen gas from breathing air is absorbed into the body. The deeper the dive,
 24 the faster nitrogen dissolves into the body. Although this usually is not harmful,
 25 the problem arises when a diver ascends or surfaces and the nitrogen releases. In
 26 order to properly release the nitrogen slowly from the body, a diver must ascend
 27 slowly and carry out necessary decompression stops to allow the body to adjust.
 28

1 16. If a diver ascends or surfaces too quickly to allow diffusion of the
2 nitrogen, nitrogen gas bubbles will form in the body tissue, resulting in
3 decompression sickness otherwise known as the “bends”. Decompression
4 sickness can lead to headaches, joint pain, numbness, paralysis, nitrogen
5 narcosis, and even death.

6 17. The Dive Computers are a critical instrument to assist divers in
7 avoiding decompression sickness. The Dive Computers are used to track the
8 depth and time of the dive and calculate theoretical and actual time and depth
9 limits the diver should stay within to avoid decompression sickness. Inaccurate
10 information regarding depth and dive time can lead to serious injury or death to
11 the diver.

12 18. In addition to dive depth and time for purposes of avoiding
13 decompression sickness, the Dive Computers also display other critical
14 information such as, water temperature (which can affect the likelihood of
15 decompression sickness), air tank pressure, and estimated remaining air time. A
16 misreading of any of this information can also lead to serious injury or death.

17 19. The only reason to purchase a Dive Computer is to have knowledge
18 of the critical information regarding a dive. If the Dive Computer cannot reliably
19 provide that information, it is worthless.

20 20. Aqua Lung advertises the Dive Computers as having the ability to
21 provide critical information regarding a dive such as, dive depths, air pressure,
22 and remaining air time. For example, on its website Aqua Lung states:

23 “Suunto Cobra3 enables continuous decompression for optimal
24 ascent time.”

25 “Suunto Cobra3 monitors and displays your tank pressure, tracks
26 your rate of air consumption, and continuously calculates your
27 remaining air time. It also provides visual and audible alarms for
28 depth and pressure and warns you when you’re running low on air.”

 “Suunto Cobra monitors and displays your tank pressure, tracks your

1 rate of consumption, and continuously calculates your remaining air
2 time.”

3 “Suunto Cobra enables continuous decompression for optimal ascent
4 time.”

5 For the Suunto Viper Air, “[t]ank pressure is displayed both
6 numerically and graphically, and an estimation of the remaining air
7 time is given throughout the dive. This allows you to monitor
8 remaining air supply at the same time as you monitor depth and
9 time.”

10 “Suunto Vyper enables continuous decompression for optimal
11 ascent time.”

12 21. However, the Dive Computers are defective and prone to
13 malfunction, resulting in the Dive Computers providing inaccurate information
14 regarding dive depth, dive time, air pressure, and remaining air time.

15 22. Aqua Lung, as the distributor and an authorized repair facility for
16 the Dive Computers, knew or should have known that the Dive Computers were
17 failing and defective and knew or should have known that the failing and
18 defective Dive Computers created a life threatening risk of harm to consumers.

19 23. Aqua Lung repair representatives are trained by Suunto on how to
20 repair the Dive Computers. Aqua Lung receives Dive Computers for repair
21 directly from consumers and through dive shops where consumers bring their
22 Dive Computers.

23 24. Since as at least 2005, Aqua Lung has received Dive Computers for
24 repair from consumers who experienced permanent malfunction of the dive
25 computer due to the defective software and/or hardware. When a permanent
26 malfunction occurs, the Dive Computers report incorrect depths, “self-dive” or
27 indicate that a dive is occurring when no dive is in fact occurring, report
28 incorrect air time remaining, and/or report incorrect air tank pressure. All of
these malfunctions are the result of defective software and/or hardware in the
Dive Computers.

25. Several online message boards related to scuba diving catalog the manifestations of the common defect. On one message board, www.scubaboard.com, a consumer complains that his Dive Computer has an error code and he inquires about how to get rid of the error. A person referring to himself as “Chris from Suunto” replies, “The ‘permanent’ error mode that was spoke of in the post...is due to a computer malfunction within the pressure sensor circuit. The computer thinks it is continuously diving and [displays] erroneous depths for hours on end. If this error occurs there is no way to clear it from the computer. The fault will stay within the memory in the computer even after the battery is removed. This is an unrepairable fault and the unit would need to be replaced.”¹ Numerous similar complaints have been made by consumers regarding the Dive Computers.

26. There has been at least one reported death as a result of a defective Dive Computer malfunctioning during a dive. On December 10, 2010, off the island of Lanai in Hawaii, Pamela Seigman was diving with a brand new (never before used) Suunto Cobra 2 Dive Computer. During Ms. Seigman’s second dive of the day, unbeknownst to Ms. Seigman or anyone else on the dive, her Dive Computer malfunctioned and failed to display the correct pressure remaining in her air tank and failed to sound alarms that the manual states the computer will provide. The Dive Computer reported substantial air remaining in Ms. Seigman’s air tank when, in reality, she was out of air. Ms. Seigman died from asphyxia due to salt water drowning. The Coast Guard investigation of Ms. Seigman’s death concluded that she died as a result of “equipment failure.” During subsequent testing of Ms. Seigman’s Dive Computer by Aqua Lung, the Dive Computer malfunctioned and displayed an “ER 1” code, indicating that the Dive Computer was defective and unrepairable.

¹ <http://www.scubaboard.com/forums/archive/index.php/t-437067.html>

1 27. As the distributor and authorized repair provider of the Dive
2 Computers, and a dive equipment manufacturer for over 60 years, Aqua Lung
3 knows that the safe and reliable operation of the Dive Computers is an important
4 concern to consumers. Likewise, as the distributor and authorized repairer of the
5 Dive Computers, defendant is in the superior position to know about actual and
6 potential risks and dangers with the Dive Computers. This knowledge places
7 Aqua Lung in a superior position, relative to consumers, to receive, collect, and
8 respond to relevant issues about the performance and/or defective characteristics
9 of the Dive Computers.

10 28. Despite having knowledge that the Dive Computers all contain the
11 inherent defects, malfunction, and pose a significant hazard to consumers,
12 defendant does not inform consumers or the CPSC of these facts. Indeed,
13 defendant has never issued a recall of the Dive Computers or otherwise notified
14 consumers that the Dive Computers contain a defect in the software and/or
15 hardware that can result in inaccurate readings of critical information during a
16 dive.

17 29. Instead, Aqua Lung continues to cover up the defect and consumers
18 who use the Dive Computers are left using dangerous and defective products.
19 When Aqua Lung receives a Dive Computer that has suffered a permanent
20 malfunction as described above, it is Aqua Lung's practice to not conduct any
21 repairs. That is because, when the Dive Computer has malfunctioned
22 permanently as a result of the defective software and/or hardware it is
23 unrepairable.

24 30. If the Dive Computer is outside of warranty, Aqua Lung simply tells
25 the customer that there is no repair.

26 31. If the Dive Computer is within the product warranty, it is Aqua
27 Lung's practice to replace the defective Dive Computer with a new Dive
28 Computer. In fact, the computer defect is so prevalent that the ordinary two-year

1 warranty for the Dive Computers was extended to five years for problems related
 2 to self-diving, incorrect depth readings, tank pressure, and temperature, and other
 3 improper operations. However, Aqua Lung did not inform the public it extended
 4 the warranty to deal with the defective Dive Computers.

5 32. Additionally, the replacement Dive Computers do not provide any
 6 relief because they suffer from the same hardware and/or software defect. When
 7 a customer receives a replacement Dive Computer in lieu of a repair, that
 8 customer reasonably believes that the new Dive Computer will not suffer from
 9 the same dangerous defect. However, because all of the Dive Computers contain
 10 substantially the same software and/or hardware, the defect exists in all of them,
 11 including the replacements.

12 33. None of the warnings on the product packaging or in other
 13 marketing informed plaintiff or other consumers that because of the Dive
 14 Computers' inherent defect in the software and/or hardware, ordinary use of the
 15 Dive Computers carries a substantial risk of serious malfunction whereby the
 16 Dive Computer may quit working and/or provide incorrect information about a
 17 dive. Instead of properly warning consumers of the hazards posed by using the
 18 Dive Computers as intended, Aqua Lung continues to falsely represent that the
 19 Dive Computers will provide certain accurate information during a dive and
 20 impliedly that the Dive Computers are safe for use.

21 34. As a result of Aqua Lung's omissions and representations, plaintiff
 22 and the class members have been deceived into purchasing and continuing to use
 23 the inherently defective, unsafe, and unreliable Dive Computers that have caused
 24 plaintiff and the class members to suffer injury and lose money or property.

25 35. Defendant advertised the Dive Computers as a safe product and
 26 failed to warn consumers that the Dive Computers are defective, and may
 27 malfunction and cause serious bodily harm or death during intended use.
 28 Plaintiff and class members purchased and used the Dive Computers reasonably

1 believing that the product was safe for its intended use.

2 36. The inherent defect was a material fact, as the defect caused safety
3 concerns and unreasonable risk of injury, and plaintiff would not have purchased
4 or used the Dive Computer had he known that the product was defective and
5 could malfunction and cause serious bodily harm or death.

6 37. Defendant's omissions and misrepresentations were a material
7 factor in influencing plaintiff's decision to purchase the Dive Computer and
8 defendant reaped, and continues to reap, large profits from its deceptive
9 marketing, distribution, and repair of the Dive Computers.

10 38. Defendant's remedy for some consumers of providing a replacement
11 Dive Computer is insufficient because the replacement Dive Computers contain
12 the same defects.

13 **CLASS DEFINITION AND ALLEGATIONS**

14 39. Plaintiff brings this action on behalf of himself and all others
15 similarly situated pursuant to Rule 23(a), (b)(2), and (b)(3) of the Federal Rules
16 of Civil Procedure and seeks certification of the following class:

17 All persons and entities who purchased a Suunto Cobra, Suunto
18 Cobra 2, Suunto Cobra 3, Suunto Cobra 3 Black, Suunto Vyper,
19 Suunto Vyper 2, Suunto Vyper Air, Suunto HelO2, Suunto Gekko,
20 Suunto Vytex, Suunto Vytex DS, Suunto D9tx, Suunto D9, Suunto
21 D6, Suunto D6i, Suunto D4i, Suunto D4, and Suunto Zoop
(collectively, "Dive Computers") in the United States for personal
use.

22 40. Excluded from the class is defendant, its parents, subsidiaries,
23 affiliates, officers and directors, those who purchased Dive Computers for the
24 purpose of resale, and those who assert claims for personal injury.

25 41. Members of the class are so numerous and geographically dispersed
26 that joinder of all class members is impracticable. Plaintiff is informed and
27 believes, and on that basis alleges, that the proposed class contains many
28 thousands of members. The precise number of class members is unknown to

1 plaintiff.

2 42. Common questions of law and fact exist as to all members of the
3 class and predominate over questions affecting only individual class members.
4 The common legal and factual questions include, but are not limited to, the
5 following:

- 6 i. Whether defendant knew or should have known that use of the Dive
7 Computers poses a serious risk of bodily harm or death;
- 8 ii. Whether defendant knew or should have known that the Dive
9 Computers were inherently defective and could malfunction in the
10 normal course of use;
- 11 iii. Whether defendant had a duty to inform plaintiff and class members
12 of the defective nature of the Dive Computers, as well as the
13 malfunction and physical injury and death risks associated with
14 using its Dive Computers;
- 15 iv. Whether defendant's omissions and/or representations concerning
16 the safety and appropriate uses of the Dive Computers were likely to
17 deceive;
- 18 v. Whether defendant's alleged conduct violates public policy;
- 19 vi. Whether the alleged conduct constitutes violations of the laws
20 asserted herein;
- 21 vii. Whether defendant engaged in false or deceptive advertising;
- 22 viii. Whether plaintiff and class members have sustained monetary loss
23 and the proper measure of that loss;
- 24 ix. Whether plaintiff and class members are entitled to restitution,
25 disgorgement of defendant's profits, declaratory and/or injunctive
26 relief; and
- 27 x. Whether plaintiff and class members are entitled to an award of
28 compensatory damages.

1 43. The claims asserted by plaintiff in this action are typical of the
2 claims of the members of the class, as the claims arise from the same course of
3 conduct by defendant, and the relief sought is common. Plaintiff and class
4 members suffered uniform damages caused by their purchase of the Dive
5 Computer marketed and distributed by defendant.

6 44. Plaintiff will fairly and adequately represent and protect the interests
7 of the members of the class. Plaintiff has retained counsel competent and
8 experienced in both consumer protection and class litigation.

9 45. A class action is superior to other available methods for the fair and
10 efficient adjudication of this controversy. The expense and burden of individual
11 litigation would make it impracticable or impossible for proposed class members
12 to prosecute their claims individually. It would thus be virtually impossible for
13 the class, on an individual basis, to obtain effective redress for the wrongs done.
14 Furthermore, even if class members could afford such individualized litigation,
15 the court system could not. Individualized litigation would create the danger of
16 inconsistent or contradictory judgments arising from the same set of facts.
17 Individualized litigation would also increase the delay and expense to all parties
18 and the court system from the issues raised by this action. By contrast, the class
19 action device provides the benefits of adjudication of these issues in a single
20 proceeding, economies of scale, and comprehensive supervision by a single
21 court, and presents no unusual management difficulties under the circumstances
22 here.

23 46. In the alternative, the class also may be certified because defendants
24 have acted or refused to act on grounds generally applicable to the class thereby
25 making final declaratory and/or injunctive relief with respect to the members of
26 the class as a whole appropriate.

27 47. Plaintiff seeks preliminary and permanent injunctive and equitable
28 relief on behalf of the entire class, on grounds generally applicable to the entire

1 class, to enjoin and prevent defendants from engaging in the acts described, and
 2 to require defendants to provide full restitution to plaintiff and class members.

3 48. Unless a class is certified, defendant will retain monies that were
 4 taken from plaintiff and class members as a result of defendant's wrongful
 5 conduct. Unless a classwide injunction is issued, defendant will continue to
 6 commit the violations alleged and the members of the class and the general
 7 public will continue to be misled.

8 **COUNT I**

9 **Violation of the Consumers Legal Remedies Act**

10 **Civil Code § 1750 *et seq.***

11 49. Plaintiff re-alleges and incorporates by reference the allegations
 12 contained in the paragraphs above as if fully set forth herein.

13 50. This cause of action is brought under the Consumers Legal
 14 Remedies Act, California Civil Code § 1750, *et seq.* (the "Act"). Plaintiff is a
 15 consumer as defined by California Civil Code § 1761(d). The Dive Computers
 16 are goods within the meaning of the Act.

17 51. Defendant violated and continues to violate the Act by engaging in
 18 the following practices proscribed by California Civil Code § 1770(a) in
 19 transactions with plaintiff and the class which were intended to result in, and did
 20 result in, the sale of the Dive Computers:

21 (5) Representing that [the Products] have... approval,
 22 characteristics,... uses [and] benefits... which [they do] not
 have

23 * * *

24 (7) Representing that [the Products] are of a particular standard, quality
 25 or grade. . . if [they are] of another.

26 * * *

27 (9) Advertising goods. . . with intent not to sell them as advertised.

28 * * *

1 (16) Representing that [the Products have] been supplied in accordance
2 with a previous representation when [they have] not.

3 52. Defendant violated and continues to violate the Act by failing to
4 disclose material facts about the Dive Computers as described above when they
5 knew, or should have known, that the Dive Computers are defective and can
6 malfunction, posing a serious risk of injury or death to consumers. Defendant
7 further violates the Act by advertising that the Dive Computers perform certain
8 functions when the Dive Computers are defective and can malfunction, resulting
9 in a loss of those functions.

10 53. Pursuant to § 1782(d) of the Act, plaintiff and the class seek a court
11 order enjoining defendant's above-described wrongful acts and practices and for
12 restitution and disgorgement.

13 54. Pursuant to § 1782 of the Act, plaintiff notified defendant in writing
14 by certified mail of the particular violations of § 1770 of the Act and demanded
15 that defendant rectify the problems associated with the actions detailed above
16 and give notice to all affected consumers of defendant's intent to so act. A copy
17 of the letter is attached hereto as Exhibit A. If defendant fails to rectify or agree
18 to rectify the problems associated with the actions detailed above and give notice
19 to all affected consumers within 30 days of the date of written notice pursuant to
20 § 1782 of the Act, plaintiff will amend this complaint to add claims for damages,
21 as appropriate.

22 55. Defendant's conduct is malicious, fraudulent and wanton, and
23 provides misleading information.

24 56. Pursuant to § 1780(d) of the Act, attached hereto as Exhibit B is the
25 affidavit showing that this action has been commenced in the proper forum.
26
27
28

COUNT II

Violation of Business & Professions Code § 17200, *et seq.*

57. Plaintiff re-alleges and incorporates by reference the allegations contained in the paragraphs above as if fully set forth herein.

58. As alleged herein, plaintiff has suffered injury in fact and lost money or property as a result of defendant's conduct because he purchased a Dive Computer that has defective software and/or hardware, resulting in the Dive Computer being unsafe for ordinary use.

59. In the course of conducting business, defendant committed unlawful business practices by, *inter alia*, omitting and/or misrepresenting material facts concerning the safety and integrity of the Dive Computers, making representations (which also constitute advertising within the meaning of § 17200 and § 17500) as set forth more fully herein, and violating Civil Code §§ 1572, 1573, 1709, 1711, 1770(a)(5), (7), (9) and (16) under the CLRA, Business & Professions Code §§ 17200, *et seq.*, 17500, *et seq.*, and the common law, including breach of implied warranty. Defendant's above-described wrongful acts and practices constitute actual and constructive fraud within the meaning of Civil Code §§ 1572 and 1573, as well as deceit, which is prohibited under Civil Code §§ 1709 and 1711.

60. Plaintiff and the class reserve the right to allege other violations of law, which constitute other unlawful business acts or practices. Such conduct is ongoing and continues to this date.

61. Defendant's omissions, non-disclosures, acts, misrepresentations, and practices as alleged herein also constitute "unfair" business acts and practices within the meaning of Business and Professions Code § 17200, *et seq.*, in that their conduct is substantially injurious to consumers, offends public policy, and is immoral, unethical, oppressive, and unscrupulous as the gravity of the conduct outweighs any alleged benefits attributable to such conduct.

62. As stated in this complaint, plaintiff alleges violations of consumer protection, unfair competition and truth in advertising laws resulting in harm to consumers. Plaintiff asserts violations of the public policy of engaging in false and misleading advertising, unfair competition and deceptive conduct towards consumers. This conduct constitutes violations of the unfair prong of Business & Professions Code § 17200, *et seq.*

63. There were reasonably available alternatives to further defendant's legitimate business interests, other than the conduct described herein.

64. Defendant's claims, nondisclosures and misleading statements, as more fully set forth above, are also false, misleading and/or likely to deceive the consuming public within the meaning of Business & Professions Code § 17200, *et seq.*

65. Defendant's conduct caused and continues to cause substantial injury to plaintiff and the other class members. Plaintiff has suffered injury in fact and has lost money or property as a result of defendant's unfair conduct.

66. Plaintiff, on behalf of himself, and all others similarly situated, seeks restitution of all money obtained from plaintiff and the members of the class as a result of defendant's unfair competition, an injunction prohibiting defendant from continuing such practices, corrective advertising and all other relief this court deems appropriate, consistent with Business & Professions Code § 17203.

COUNT III

Breach of Implied Warranty

67. Plaintiff re-alleges and incorporates by reference the allegations contained in the paragraphs above as if fully set forth herein.

68. The Uniform Commercial Code § 2-314 provides that, unless excluded or modified, a warranty that the goods shall be merchantable is implied in a contract for their sale if the seller is a merchant with respect to goods of that

1 kind.

2 69. California has adopted the provisions of the Uniform Commercial
3 Code governing the implied warranty of merchantability Cal. Comm. Code
4 § 2314.

5 70. The Dive Computers are “goods” as defined in the California
6 commercial code governing the implied warranty of merchantability.

7 71. As a distributor and marketer of the Dive Computers, defendant is a
8 “merchant” within the meaning of the various states’ commercial codes
9 governing the implied warranty of merchantability.

10 72. By placing the Dive Computers in the stream of commerce,
11 defendant impliedly warranted that the Dive Computers are reasonably safe,
12 effective and adequately tested for their intended use and that they are of
13 merchantable quality.

14 73. As a merchant of the Dive Computers, defendant knew that
15 purchasers relied upon it to distribute Dive Computers that were reasonably safe,
16 and in fact members of the public, including plaintiff, reasonably relied upon
17 defendant’s skill and judgment and upon said implied warranties in purchasing
18 and using the Dive Computers.

19 74. Plaintiff and the class members purchased the Dive Computers to be
20 used for their intended purpose.

21 75. In breach of its implied warranty, the Dive Computers are not safe
22 and not merchantable because the computers malfunction, resulting in incorrect
23 information regarding a dive and may cause serious bodily harm or death.

24 76. The Dive Computers were not reasonably safe for their intended use
25 when they left defendant’s control and entered the market.

26 77. The Dive Computers’ defects were not open or obvious to
27 consumers, including plaintiff and the class, who could not have known about
28 the nature of the risks associated with the Dive Computers until after the Dive

1 Computers malfunctioned.

2 78. All conditions precedent to defendant's liability under this contract
3 have been performed.

4 79. Plaintiff and class members were the intended beneficiaries and
5 users of the Dive Computers. Defendant created the advertising at issue and
6 warranted the Dive Computers to them directly and/or through the doctrine of
7 agency.

8 80. As a direct and proximate result of defendant's breach of implied
9 warranties, plaintiff and class members have sustained injuries by purchasing the
10 Dive Computers. Plaintiff and class members are entitled to judgment and
11 equitable relief against defendant, as well as restitution, including all monies paid
12 for the Dive Computers, disgorgement of profits that defendant received from
13 distribution of the Dive Computers, attorneys' fees, punitive damages, and costs,
14 as set forth in the Prayer for Relief.

15 PRAYER FOR RELIEF

16 Wherefore, plaintiff prays for a judgment:

- 17 A. Certifying the class as requested herein;
- 18 B. Awarding plaintiff and the proposed class members damages;
- 19 C. Awarding restitution and disgorgement of defendant's revenues to
20 plaintiff and the proposed class members;
- 21 D. Awarding declaratory and injunctive relief as permitted by law or
22 equity, including enjoining defendant from continuing the unlawful practices as
23 set forth herein, and directing defendant to identify, with court supervision,
24 victims of its conduct and pay them restitution and disgorgement of all monies
25 acquired by defendant by means of any act or practice declared by this Court to
26 be wrongful;
- 27 E. Ordering defendant to engage in a corrective advertising campaign;
- 28 F. Awarding attorneys' fees and costs; and

G. Providing such further relief as may be just and proper.

JURY DEMAND

Plaintiff demands a trial by jury on all issues so triable.

Dated: May 21, 2015

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